IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO.1587 OF 2004

Vivek Kumar Mishra. .. .. Petitioner

v/s.

1. The Union of India & ors. .. Respondents

Mr.A.P. Singh for Petitioner.

Mr.D.N. Salvi for Res.Nos.1 to 7.

Mr.I.S. Thakur, APP for State.

CORAM : H.L. GOKHALE &

SMT.V.K.TAHILRAMANI, JJ.

DATED : 17th August 2004

P.C. :

1. Heard Mr.Singh for the Petitioner. Mr.Salvi appears for Respondent Nos.1 to 7 and Mr.Thakur for State.

2. The Petitioner was serving at the relevant time as a Sailor in Indian Navy holding the rank and status of Leading Air Mechanic. During his service, he suffered from an ailment and, therefore, was transferred for general duties from

15th February 2001. While discharging his duties, the Petitioner was required to work as a Liquor-in-Charge in Unit Run Canteen of the Naval Air Station Kunjali II. It was alleged against the Petitioner that between 27th January 2003 and 15th September 2003, he committed criminal breach of trust in respect of 2103 bottles of assorted brands of liquor worth Rs.2,43,729.79. He was charge-sheeted and court marshalled and finally at the end of the trial, having found him guilty, an order of sentence came to be passed on 18th June 2004 that he will be dismissed from Naval service and will also undergo rigorous imprisonment for 18 calendar months and will pay a fine of Rs.2,43,730/- and in default, suffer RI for six months further. It is being aggrieved by this order that the present Petition has been filed.

3. There is no dispute that during the pendency of the said proceeding i.e. from 16th September 2003, the Petitioner is placed under close custody in DSC Cell, i.e. by now, he is already in custody by 11 months. There are various submissions which Mr.Sing has to make against both parts of the order, namely, dismissal as well as the sentence. The Petitioner has in the meanwhile filed an Appeal under Section 162 of the Navy Act to the Defence Ministry. That Appeal is not yet

decided.

4. When the Petition came up for consideration for admission on the last date, we asked Mr.Salvi appearing for the Respondents to take instructions as to whether the Naval Authorities will consider the release of the Petitioner pending decision of the Appeal. Mr.Salvi has taken instructions and has stated that a period of further two weeks will be required to take a decision. As the facts are disclosed and recorded above, out of the sentence of 18 months, the Petitioner has been in custody for 11 months and his Appeal is yet to be considered and decided. In this state of affairs, it is submitted that the Petitioner has been in custody for sufficiently long period and the Petitioner be released pending his Appeal to the Naval Authorities.

5. Mr.Salvi appearing for the Respondents has submitted that instead of Appeal to the Defence Ministry, the Petitioner may file a Review under Section 160 of the Navy Act. Mr.Singh appearing for the Petitioner states that without prejudice to the maintainability of the Appeal, the Petitioner will file a Review since the Naval Authorities are asking for it. Mr.Salvi has stated that the Authorities concerned will decide

the Review, if filed, within two weeks. We do not mind, if they decide it within four weeks, provided they pass a reasoned order at the end of it. It is submitted by Mr.Singh that in the meanwhile, the Petitioner need not be retained in custody. On the submissions of both the Counsel, we are confining this Petition only to the question of the Petitioner's continuation in custody. Rule. Both the Counsel are heard.

6. Mr.Salvi appearing for the Respondents has submitted that the period of sentence is to be computed from the date of the decision and the earlier period is not to be considered because set off is not available under the Navy Act. As against that, Mr.Singh appearing for the Petitioner has drawn our attention to an amendment which was proposed to the Navy Act whereunder Section 151 was sought to be amended to provide a set off for all such contingencies. Unfortunately that amendment does not seem to have been pursued. Mr.Singh, however, submits that the spirit behind the same should be taken into consideration.

7. We see the force in the submissions of Mr.Singh. It is quite possible that in this fashion the Petitioner will be retained in custody for the full period and later on, will be told

that his Appeal was being allowed. In the circumstances, we pass an order directing the Respondents to release the Petitioner from the custody. This does not mean any decision on the conviction and sentence or on the dismissal imposed by the Respondents on the Petitioner. All contentions would be available to the Petitioner in his Review, Appeal and thereafter, if required. A decision with respect to both viz. the dismissal from service as well as the conviction and punishment will be arrived at when the Petitioner files a Review Application to the Naval Authorities and in any case, if the Petitioner is aggrieved by that decision, he may as well file an Appeal under Section 162 of the Navy Act. In case that decision goes against the Petitioner, it will be open to him to recourse to the appropriate proceedings.

8. Though we are directing the release of the Petitioner, that will, however, be on the following conditions:-

(i) The Petitioner will report to the officer of duty OOD INS Angre on Monday, Wednesday and Friday at 10 A.M. He will be relieved within an hour, if not required.

. (ii) Passport of the Petitioner will be surrendered to the Commanding Officer INS Angre.

9. Rule is made absolute only in the aforesaid terms.

10. All parties will act on an authenticated copy of this order.

(H.L. GOKHALE, J.)

(V.K.TAHILRAMANI, J.)